82-255

Office-Supreme Court, U.S.
FILED
AUG
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____.

PARK PLACE, INCORPORATED,

Petitioner

-vs-

CITY OF CLEVELAND, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

John R. Vintilla,
112 Plaza West Building,
20220 Center Ridge Road,
Cleveland, Ohio 44116,

Counsel for Petitioner.

Francis X. Cook,
Of Counsel.

QUESTIONS PRESENTED

1. Where the nature of the facilities and the extent of the privileges made available to certain businesses at an airport owned and operated by a municipality are identical in every respect, may the city arbitrarily extract from a particular business an amount far in excess of the charge demanded of and received from other businesses similarly circumstanced?

2. Where a company using city-owned airport facilities was classified as a courtesy vehicle operator with other businesses having similar airport operations, and all were paying the same charge therefor, may the city thereafter single out the company and require it to pay for the continued use of the same facilities a charge far in excess of the amount being paid by the other courtesy vehicle operators, simply because a direct competitor in the same classification agreed to pay

a larger amount, although not required to do so by the city?

3. Where the amount a municipality demands from a business using its airport facilities in interstate commerce is induced and determined solely by a direct competitor without any independent basis for the charge, is the action of the city unreasonable, or arbitrary and discriminatory and, therefore, an undue burden on interstate commerce?

PARTIES TO PROCEEDING

The parties to this proceeding are contained in the caption of the case.

TABLE OF CONTENTS

Questions Presented i

Parties to Proceeding iii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting Writ of Certiorari. 9, 16, 20

Conclusion 26

Certificate of Service 27

Appendices:

Memorandum of Opinion of District Court 28

Order of Court of Appeals Affirming District Court Judgment 40

Order of Court of Appeals Denying Petition for Rehearing En Banc 43

Ordinance No. 1101-78, City of Cleveland 45

United States Constitution, Article I, Section 8, [1] 47

TABLE OF CONTENTS

Appendices:

United States Constitution, Fourteenth Amendment 47

TABLE OF AUTHORITIES

Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago, 240 F.2d, 930,936..24

First National Ben Soc. v. Garrison, 58 F. Supp. 972, 983 24

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 413 16

Savage v. Jones, 225 U.S. 501 23

STATUTES

City of Cleveland, Ohio, Ordinance No. 1101-78 5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

PARK PLACE, INCORPORATED,

Petitioner,

vs.

CITY OF CLEVELAND, OHIO,

MARY VODICKA,

Director of Port Control,

Acting Commissioner of

Cleveland Hopkins International Airport,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, unreported, and the opinion rendered by the District Court for the Northern District of

Ohio, Eastern Division, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 25, 1982. A timely petition for rehearing en banc was denied on April 8, 1982, and this petition for certiorari was filed within the period extended by Justice O'Connor. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution; the Fourteenth Amendment thereto; and the City of Cleveland, Ohio, Ordinance No. 1101-78 -- all appear in the Appendix hereto.

STATEMENT OF THE CASE

The petitioner instituted this action for a declaratory judgment and injunctive

relief to invalidate an ordinance of the City of Cleveland, Ohio, which arbitrarily discriminated against the petitioner in violation of the petitioner's federal constitutional rights and of the Commerce Clause.

Upon motions for a summary judgment submitted by the respective parties, the district court ruled in favor of the respondents and dismissed the complaint. The Court of Appeals affirmed the decision of the district court by means of an abrupt two-page order. The petition for a rehearing en banc addressed to the circuit court was denied.

Since July 1, 1977 the petitioner has operated a courtesy vehicle service, also known as a shuttle bus service, to and from Cleveland Hopkins International Airport, whereby it picks up and delivers airline passengers who park their automobiles at the petitioner's parking lot near the airport in Brook Park, Ohio. Pursuant to the Board of Control Resolution No. 039-78 of June 5, 1978,

the Respondent-City (hereinafter referred to as City) established a classification of all companies which furnished courtesy service to their customers to and from the airport. On June 6, 1978 the City sent the petitioner a letter, advising it, among other things, of the classification, and listing the companies therein, as follows:

1. Park 'N' Fly
2. Park Place (anticipated)
3. A-1 Rent-A-Car
4. Holiday Inn, Strongsville
5. Ramada Inn
6. Holiday Inn, Airport
7. Howard Johnson's
8. Sheraton Hopkins
9. Marriott
10. Travelodge
11. Hollenden House
12. Bond Court
13. Sheraton Airport
14. Bratenahl
15. Hospitality Inn
16. Port O' Call
17. Budget Inn
18. Dollar Inn

By virtue of the classification, the City assigned to the petitioner and others offering courtesy shuttle service, specific and equally non-exclusive areas at the airport

terminal to pick up and discharge their respective customers. A permit, as required, was secured by the petitioner from the City for the operation of its vehicles on airport property, for which petitioner, as well as the other courtesy vehicle operators, paid the City $250 every six months for each vehicle used as a shuttle bus.

On February 12, 1979 the City Council of Cleveland enacted an "Emergency" Ordinance, No. 1101-78, requiring the petitioner to enter into a two-year contract with the City and to pay the sum of "Ten Thousand Dollars ($10,000.00) or five per cent (5%) of all gross revenues per year, whichever is greater," for the continued right to operate its vehicles upon the airport. (See Appendix, Page 45.)

For approximately six months prior to the institution of this cause, and in order to compel the petitioner to pay the new charges, the petitioner was harassed and

threatened. Its employees were subjected to criminal proceedings which were ultimately resolved in favor of the employees. During this same period, the petitioner's permit to operate at the airport was revoked, and its sign at the airport removed, all of which compelled the petitioner to seek judicial relief to protect and preserve its rights during the pendency of the instant case. Following the issuance of a temporary restraining order, petitioner executed the contract required by the aforementioned Ordinance, reserving the right to challenge the constitutionality of the Ordinance and the validity of the payments made thereunder. The parties entered into the agreement in order to permit the petitioner to pursue the instant litigation without prejudice.

The abrupt and persistent demand by the City that the petitioner must pay 5% of its gross annual receipts for the continued use of the airport facilities, was caused by the

sudden and voluntary agreement of a direct and sole competitor of the petitioner and courtesy bus operator, Park 'N' Fly of Ohio, Inc., to pay 5% of its annual gross earnings for the continued privilege of operating its shuttle bus service on airport property. In a letter addressed to the Director of Port and Harbors, the chairman of Park 'N' Fly of Ohio, Inc., Mr. Martin J. Bloom, wrote among other things, as follows:

> This letter is in confirmation of our meeting last week with you and Mr. N.M. DeVito, City Attorney. Our understanding of the agreements reached at the meeting are as follows:
>
> 1) We will pay retroactive to July 1, 1975, the same courtesy vehicle fee that the other courtesy vehicle operators (hotels, motels, off-airport rent-a-car companies, etc.) have agreed to pay on the same retroactive basis. This fee of $250 per courtesy vehicle per six months amounts to $2000.00 for our eight vehicles for the period July 1 - December 31.
>
> 2) Effective January 1, 1976, we will implement our agreement

> to pay the Cleveland Hopkins International Airport 5% of our gross parking revenues in exchange for sign privileges and a non-exclusive waiting area at the terminal building for our courtesy vehicles . . ..

As a result of the so-called "Emergency" Ordinance, the petitioner alone was compelled to pay a charge for its airport operations far in excess of that which it had been paying, although the petitioner's privileges at the airport continued to be the same. The other courtesy vehicle operators - the hotels and motels - continued to pay only $250 per vehicle. The reason or basis for the abrupt change in petitioner's classification by the City of Cleveland was never documented officially. The petitioner was not consulted or given an opportunity to discuss or to be heard concerning the drastic and sudden change in the amount demanded by the City. Moreover, the City had not undertaken any surveys or official studies in the public interest to

substantiate and justify its action against the petitioner. Subsequent to the enactment of the challenged Ordinance, the petitioner's operations at the airport continued to be identical in every respect to those engaged in by the petitioner prior thereto.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of this Court, and violates the equal protection rights of the petitioner as secured by the Fourteenth Amendment.

The issue before the court involves the constitutional validity of a certain ordinance of the City of Cleveland. The precise question presented for decision is whether the action of the City - in singling out the petitioner and imposing a separate charge upon its airport operations, while exempting from such charge other businesses that were being provided similar services and facilities - is so arbitrary and discriminatory as

to fall within the constitutional prohibition of the Fourteenth Amendment.

In affirming the decision of the District Court in an two-page Order, the Sixth Circuit stated:

> . . .there was no showing that Ordinance No. 1101-78 either imposed an unreasonable burden upon interstate commerce or arbitrarily discriminated in favor of hotels and motels which had been excluded from the scope of that ordinance. . . .

We shall first direct our arguments to the finding of the District Court, ratified by the Circuit Court, that "there was no showing that the Ordinance . . .discriminated in favor of hotels and motels which had been excluded from the scope of that ordinance...."

The immutable evidence in the record reveals that the City had at an earlier time created a special classification of all businesses which use the airport facilities in connection with their operation of courtesy vehicles to shuttle customers to and from the

airport. The City had placed and considered the petitioner to be in the same category with the hotels and motels. Implicit in the listing of the petitioner in this category was the determination that the airport privileges awarded to the petitioner were substantially similar to those extended to the hotels and motels. The certitude of the City's determination in this respect is demonstrated by the evidence that the petitioner was permitted to operate in the same manner, and to pay the same charge therefor as the hotels and motels through the year 1978. Especially enlightening on this point is the finding of the District Judge, as follows:

> On February 8, 1978, the City of Cleveland adopted Resolution No. 038-78 which provided the Director of Port Control with authority to issue permits to operators of courtesy vehicles at the Airport for a term not to exceed six months at a fee of not less than $250 per vehicle. The Resolution also provided for the designation and restriction of the location of waiting and pick-up areas for such vehicles for the

> purpose of ameliorating traffic congestion at the Airport. Park Place was assigned two such waiting and pick-up areas and paid the required fees on at least two of the six vehicles it was operating. Various other businesses which provided courtesy shuttle service to the Airport, comprised principally of hotels and motels, were required to comply with the resolution as well. (underscoring ours)

It is important to remember that the nature and extent of the facilities and privileges which the City extended to the petitioner in 1979 and thereafter were identical to those which had been accorded the petitioner in the period immediately prior to the enactment of the challenged ordinance. As a result of the "Emergency" Ordinance of 1979, the petitioner was the only business in the courtesy vehicle classification which was compelled to pay a larger amount for the continued use of the identical facilities at the airport.

In light of the uncontroverted evidence, it is ironic that the lower courts have

agreed and concluded that the petitioner and the hotels and motels are in a separate classification with regard to the privileges and facilities accorded them, respectively, at the airport The serious error in this regard is that the record clearly shows that the City always considered and classified the petitioner as a courtesy vehicle operator along with hotels and motels. A further corroboration of this fact is to found in an ordinance proposed by the City to govern airport activities of various businesses which the City had submitted to the City Council of Cleveland for adoption. The proposal appears in the City Record, January 13, 1982. The relevant section of the proposed ordinance is Section 571.01(h). It reads:

> "Courtesy vehicle" means any motor vehicle, other than a bus, limousine or taxicab, which is regularly operated for transport of passengers and/or baggage without a charge separately stated to the passenger between the Airport and any motel, hotel, auto rental office, parking

> lot, or other commercial activity situated off-Airport. (underscoring ours)

Thus, we see that a "courtesy vehicle" is defined by the City as a motor vehicle which transports passengers and/or baggage without a charge separately stated between the particular business located on off-airport property and the Airport. The significant aspect of the language is that it specifically excludes a bus, limousine or taxicab because such businesses extract a charge for the transportation of a passenger and/or baggage to the Airport. The common denominator of the classification is the category of businesses that shuttle passengers to the Airport without a charge separately stated. And the City includes the petitioner and the hotels and motels in the same category.

A municipal ordinance is a State statute for purposes of federal jurisdiction, New Orleans v. Duke, 427 U.S. 297, 301 (1976).

The Equal Protection Clause of the federal constitution requires that the distinction drawn by the Ordinance in question must rationally promote a legitimate municipal interest, Dandridge v. Williams, 397 U.S. 471, 486-487. The police power of the City of Cleveland with regard to the operation of its airport must be exercised by means of ordinances that are equal and uniform in their application. The City may not arbitrarily discriminate between those to whom it extends equal privileges or facilities. A charge cannot be imposed upon a particular business while other businesses in the same class are exempt from a like charge. In the final analysis, the City must not foster invidious discrimination - that is, it must not discriminate unfairly among those businesses to whom it extends similar privileges on airport property.

The discrimination in our case between the petitioner and the hotels, motels, etc.,

with identical operations and privileges at the Cleveland Hopkins International Airport is palpably arbitrary. The guiding rule to be used in determining the constitutional validity of the Ordinance was enunciated by this Court in the case of F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). It reads, as follows:

> . . . The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

2. The decision of the Sixth Circuit raises a serious question concerning the appropriate criteria to be applied by the courts in determining the reasonableness of a municipality's charge for the use of airport facilities consistent with the equal protection provision of the Fourteenth Amendment.

The Sixth Circuit Court stated:

> It appeared to Judge Manos, from the evidence and from the stipulation of facts, that the services offered by the plaintiff Park Place were qualitatively and quantitatively different from those offered by other shuttle service operators.

The Court agreed with the finding of the District Judge that the evidence supported the conclusion that the services offered by the plaintiff Park Place were qualitatively and quantitatively different from those offered by the other shuttle service operators. The critical language in the finding is "that the services offered by the plaintiff Park Place were qualitatively and quantitatively different . . .." Let us examine the propriety of this conclusion.

It has been established that the petitioner engages in the same operations, insofar as the City is concerned, as the hotels and motels, namely, the transportation of its customers between the Airport and its business

located off-Airport without a charge separately stated for such service. In other words, the petitioner delivers its customers to and picks them up from the Airport without a separate charge just as the hotels, motels, and others do. Just how this service of the petitioner is "qualitatively and quantitatively" different from that offered by other courtesy bus operators in connection with their Airport operations is left unanswered.

The principal issue in this case involves the right of a municipality to charge a reasonable fee for the use of its airport facilities. The determination of a reasonable charge entails the specific consideration of the particular services and facilities which are provided at the Airport by the City of Cleveland to the petitioner vis-a-vis the specific services and facilities extended to other businesses similarly circumstanced. The evaluation and comparison of these services and facilities is crucial to the

determination of the proper charge which the City may demand. The nature of the difference or similarity in the services provided by a municipality has been referred to as "qualitative" and "quantitative." This is a concept which some courts have resorted to in determining the reasonableness of the classification.

The district and circuit courts have misapprehended the significance of the concept as it applies to the issue in the case. The ruling in this respect illustrates a serious misconception of the relevant criterion.

The critical consideration for the City in arriving at a reasonable charge is the determination of the nature and extent of a business's operations on Airport property. If the operations on Airport property of a business are similar to those of other businesses, and the services and facilities accorded by the City are substantially alike to

all such businesses, the charge demanded by the City must be identical in order for the charge to be constitutionally permissible. Indeed, the court's conclusion is a novel approach to the problem at hand.

3. The approval by the court below of an ad hoc levy by a municipality on a company using airport facilities in interstate commerce frustrates the scope and purpose of the Commerce Clause.

The discriminatory nature of the challenged Ordinance is fatal in another important aspect. The City of Cleveland is engaged in the operation of the Airport as a public service to facilitate air travel to and from the City in interstate and international commerce for the convenience and accommodation of its citizens and the public in general. One of the essential commercial activities in connection with the operation of the Airport is the shuttle bus services for air passengers

and airlines using the airport. The City has a concern and a specific duty to encourage and to promote the best services available at the most reasonable prices possible for those who use the airport facilities. This obligation cannot be properly fulfilled unless the City performs its airport functions in a fair and impartial manner regarding those who do business at the airport.

The petitioner, in pursuit of its lawful business, is in the performance of a personal right belonging to all airline customers who move in interstate and international commerce. The Ordinance in question has permitted a private entrepreneur, rather than a governmental body, to determine the charge which its competitor must pay in order to operate its business on airport property. The improper and unlawful conduct in this respect on the part of the City is, we believe, self-evident. The approval of such a practice by the court below enabled the City to ignore its lawful

responsibility of encouraging and promoting business ventures which are essential to airline passengers and important to the effective operation of the airport. The conduct objected to by the petitioner in effect permitted a business with established operations at the airport and in other cities to voluntarily offer to pay an unreasonable amount for the privilege of airport operations in order to require a new competitor to pay a similar exorbitant amount. The competitor, being a novice in the business and insecure in the profitable operation at such an early stage, found the charge devastating.

The twofold inquiry in this regard is, (1) whether petitioner is engaged in interstate commerce, and, if so, (2) whether the Ordinance is a regulation which exceeds the City's legitimate authority. That the petitioner's airport operations affect commerce is established by the very nature of the operations. It is undisputed that the City

is entitled to a reasonable charge or fee for the use of the facilities provided at the airport. The issue is one of determining what is a reasonable charge and how that charge was determined. However, to recognize the City's authority regarding the regulation of commercial operations at the airport is not to concede that the City may exercise the authority arbitrarily and without regard to its effect on interstate commerce. The regulation or ordinance may be facially consistent but nonetheless discriminatory in its application and, therefore, in conflict with interstate commerce. Admittedly, the regulation of interstate commerce by the states is not invalid so long as there is a real relation to the suitable protection of the people of the state and so long as the regulation is reasonable in its requirements. Savage v. Jones, 225 U.S. 501 (1912).

The petitioner's services as a shuttle bus operator of airport passengers to and from

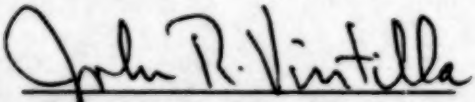
the airport, and its place of business in Brook Park, Ohio, are an integral part of the interstate package. The City may not directly burden or obstruct interstate commerce. Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago, 240 F.2d 930, 936 (7th Cir., 1967). The principle that "a State may enact local laws under its police power in the interest of the welfare of the people, although they affect interstate commerce" until the area of regulation is preempted by Congress, is not applicable where the State or local government "passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by placing burdens upon it." First Nat. Ben. Soc. v. Garrison, 58 F. Supp. 972, 984. The City has no greater authority or control over the petitioner than to "incidentally and indirectly affect it by a bona fide, legitimate and reasonable exercise of its police power" to the interest of public safety, and the free

flow of traffic (underscoring added), supra, 240 F.2d at 936-938. If there is a real relation to the protection of health, welfare or safety of the people, and if the regulation or ordinance is reasonable in its requirement and classifications, then the measure imposed by the City is a legitimate exercise of its power. However, if the ordinance in no way enhances the public safety or convenience, or if its purpose is unreasonable or arbitrarily discriminatory, the measure unduly burdens interstate commerce. This, we believe, is the true nature of the ordinance being contested in this action.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Sixth Circuit.

Respectfully submitted,

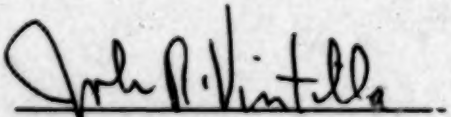


JOHN R. VINTILLA
112 Plaza West Building
20220 Center Ridge Road
Cleveland, Ohio 44116
Tel. (216) 781-3352
Counsel for Petitioner

Francis X. Cook,
of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the day of August, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James E. Young, Esquire, Director of Law, City of Cleveland, Room 106 - City Hall, Cleveland, Ohio 44114, Counsel for the Respondents. I further certify that all parties required to be served have been served.



JOHN R. VINTILLA
112 Plaza West Building
20220 Center Ridge Road
Cleveland, Ohio 44116
Tel. (216) 781-3352
Counsel for Petitioner